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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 398

HORSMAN DOLLS, INC., a corporation of New Jersey,
Petitioner,

v.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY, AND BRIEF IN SUPPORT OF PETITION.

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UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, Horsman Dolls, Inc., a corporation of New Jersey, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey reversing a judgment of the Appellate Division of the Superior Court of New Jersey.

Summary Statement of the Matter Involved.

In January 1943 the petitioner was notified by the Unemployment Compensation Commission of New Jersey that it had fixed a contribution rate of 3.6% for petitioner for the year 1942. This rate, the highest possible, was

unemployment benefits according to the records of the Commission, more unemployment compensation benefits had been paid to former employees of petitioner than the total amount contributed to the unemployment compensation fund by the petitioner. The year that was the first year after of contribution was governed by past employment experience. Prior to that time the rate for all employers in New Jersey was uniform.

The petitioner filed a petition with the Unemployment Compensation Commission seeking a redetermination of its rate (R. 2b). The petitioner contended that the rate had been illegally fixed because the Commission had charged benefit payments against the petitioner although the petitioner never had an opportunity to be heard upon the validity of the claim for benefits. The petitioner charged that under R. S. 43:21-7(b) (Supp. p. 1a) the deputy of the Commission was required to investigate the claim for benefits, find the facts thereon, and notify the petitioner of his decision. The statute contained no provision for an employer to be heard prior to the decision of the deputy, but did provide that an appeal from the decision could be taken by an employer within 7 days after receipt of the notice of the decision. The appeal would stay the payment of benefits and the charge to the employer's account.

The petitioner contended that it was denied due process under the Fourteenth Amendment to the United States Constitution because (a) no decision had ever been made by the deputy; (b) the deputy had made an unconstitutional delegation to subordinates within his department of the duty imposed upon him by the statute to investigate and find the facts and to render a decision upon the validity of the claim; (c) the deputy never notified the petitioner of a decision upon the claim for benefits; (d) the failure of

Questions Presented.

1. Did the failure of the deputy of the Unemployment Compensation Commission of New Jersey to make a decision or initial determination upon claims for benefits filed by former employees of the petitioner as required by the New Jersey statute, deprive the petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Did the action of the Unemployment Compensation Commission of New Jersey in charging the petitioner's account with benefit payments without compliance with the Unemployment Compensation law of New Jersey, and without previous notice to the petitioner of a decision and an opportunity to be heard thereon, deprive the petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

3. The New Jersey statute provided that the petitioner was entitled to receive notice of the decision of the deputy and that the appeal from such decision was to be taken after the receipt of notice. Was the action of the Unemployment Compensation Commission of New Jersey in failing to send the petitioner notice of the decision and in substituting therefor a notice of the filing of a claim for benefits—a notice not provided for in the statute and from which there was no statutory right of appeal—an unconstitutional deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

4. Does the New Jersey statute as construed by the Supreme Court of New Jersey to allow the substitution of a notice of the filing of a claim for benefits for the statutory

notice of decision deprive the petitioner of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

5. Where the statute of New Jersey required the deputy to examine into and find the facts and render a decision on the basis of the facts found by him, was there an unconstitutional delegation of these duties?

6. Was the action of the Commission in charging petitioner as a base year employer for benefits paid without any notice to petitioner either of the filing of the claim for benefits or of the decision thereon a deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Reasons for Allowance of the Writ.

1. The petitioner was entitled to an opportunity to be heard upon the validity of the claim for benefits at some stage in the proceedings. *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126 (1941). The only statutory provision for such a hearing was an appeal from the decision of the deputy to be taken within 7 days of the receipt by the petitioner of the notice of the decision. The Commission failed to send petitioner notice of the decision, but nevertheless benefits were paid to the claimants and charged against petitioner. The petitioner lost its right of appeal and its right of an opportunity to be heard by the failure of the Commission to comply with the statute.

2. The statute directed that the deputy of the Commission should investigate the facts relating to the claim for benefits and, on the basis of the facts found by him, make a decision upon the validity of the claim. The dele-

gation by the deputy of all of these duties was a denial of due process. *Morgan* v. *U. S.*, 298 U. S. 468 (1936).

3. The payment of benefits immediately created a charge against the petitioner. The statute provides that the benefits were not to be paid until the petitioner had an opportunity to be heard on the validity of the benefit claim. The Commission substituted a notice of the filing of a claim for the statutory notice of the decision thereon, although there was no provision in the statute for the substituted notice and no right of appeal therefrom. The court construed the statute so as to permit this substituted notice to serve as an appropriate opportunity to be heard. As so construed, the statute is unconstitutional. *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1927).

4. Unless this court grants certiorari, the petitioner will have been charged with benefits paid to its former employees without ever having had an opportunity to be heard upon the validity of the payments before the money was paid and before the charge was made against its account. Such a result would be contrary to applicable decisions of this court.

WHEREFORE your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of New Jersey demanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings therein and that the judgment of the Supreme Court of New Jersey be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Court may seem just.

SAMUEL KAUFMAN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the Unemployment Compensation Commission appears in the record at page 19a. The opinion of the Appellate Division of the Superior Court of New Jersey is reported in 9 N. J. Super. 101. The majority and minority opinions of the Supreme Court of New Jersey are reported in 7 N. J. 541 (Advance Sheets dated September 3, 1951).

Specification of Errors.

The Supreme Court of New Jersey erred

1. In holding that the failure of the Commission to comply with the unemployment compensation statute did not unconstitutionally deprive the petitioner of its opportunity to be heard and did not prejudice the petitioner.

2. In holding that the failure of the Commission to notify the petitioner of the decision of the deputy, as required by statute, did not deprive the petitioner of its right of appeal and of its opportunity to be heard.

3. In holding that a notice substituted by the Commission for the statutory notice of decision was appropriate to satisfy the requirement of an opportunity to be heard within the Fourteenth Amendment to the Constitution of the United States, although neither the notice nor any appeal therefrom was provided by the statute.

4. In refusing to hold that the delegation by the deputy of the duties specifically imposed upon him by the statute was unconstitutional under the Fourteenth Amendment of the Constitution of the United States.

5. In holding that the statute was to be construed as not to entitle the petitioner to notice of the decision of the deputy. As so construed, the statute is unconstitutional under the Fourteenth Amendment of the Constitution of the United States because the petitioner was then deprived of any opportunity to be heard before the decision of the deputy became effective.

6. In holding that the petitioner received an adequate hearing in 1943 before the Commission itself, whereas this hearing was held long after all of the benefits were paid and the charges made against petitioner's account. The issues raised in that hearing are the same issues now before this court. The right of each claimant to benefit payments was not involved and no claimant was produced to establish his right to the benefits which he had already received.

7. In holding that the petitioner was not entitled to have removed from its account the charges imposed where the petitioner received no notice of any kind from the Commission, not even the notice of the filing of the claim.

8. In holding that the petitioner was barred by estoppel and laches from raising the failure of the Commission to comply with the statute. These grounds are illusory and unsubstantial because they attribute to the petitioner the duty of investigating and finding facts, a duty which the statute imposes upon the Commission.

Statement of the Case.

The petitioner is a subject employer under the New Jersey Unemployment Compensation Law which became effective in 1939. The statute established an unemployment compensation fund to which all employers contribute. Until 1942 the rate of contribution was uniform for all; thereafter it was controlled by the cumulative employment experience of each employer. The vital factors in determining the rate were the benefits paid to claimants and the contributions by the employer. For the years prior to 1942, according to the Commission's records, benefits paid to former employees of the petitioner substantially exceeded its contributions to the fund. In January 1943, petitioner was notified by the Commission that it was assigned the highest rate possible, 3.6% of its annual payroll. The same rate was fixed for the years 1943, 1944 and 1945. By stipulation these rates are also governed by this litigation. The cumulative effect of the charges from 1939 to 1942 is thus of crucial importance.

The statute provides that when a claim for benefits is filed, the deputy shall investigate and on the basis of facts found by him, render a decision upon the validity of the claim. The statute then provides that the deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. The Supreme Court of New Jersey has construed the statute so that the petitioner is included within the classification of "interested party".

The employer has 7 days after receipt of the notice of the decision to appeal to a tribunal within the agency. There, for the first time, he receives a hearing at which the claimant must establish his right to benefits. If the

appeal is taken payment of the benefits is stayed. If there is no appeal, benefits are to commence after the expiration of the 7 days and the employer is charged for such payments. Usually the entire charge is against the most recent employer of the claimant, but if the duration of his employment with the most recent employer is short, then a portion of the charge is assessed against prior employers. These prior employers are referred to as "base year" employers.

The statute established a series of eligibility and qualification conditions which the claimant was required to meet in order to be entitled to benefits. It was concerning these conditions that the deputy was required to investigate and find the facts. In summary, the eligibility conditions consisted in the requirements that the claimant be able to and available for work; that he continue to report to an employment office and thus remain in the labor market; that he has been unemployed for two weeks and that he has earned a certain amount of wages during his base year. N. J. R. S. 43:21-4. The causes which will disqualify the claimant from benefits are voluntary cessation from employment without due cause, discharge for misconduct, failure to apply for or accept available or suitable work, work stoppage due to a labor dispute, and the receipt of remuneration either in lieu of notice or as compensation under any workmen's compensation law, or as social security benefits or unemployment compensation benefits from another state or the United States. N. J. R. S. 43:21-5. This was the statutory scheme for the years involved in this litigation.

For the first few months in 1939 the Commission sent to all employers, including petitioner, a form B-11 and an accompanying letter advising that a decision had been made (R271a, R277a). In May 1939 the procedure and

the form were changed by the Commission so that thereafter it sent the employers only a notice that a claim for benefits was filed. This notice was sent only to the most recent employer even though charges were assessed as well against employers in the base year. The new form asked the employer to submit any information which he had which would disqualify the claimant (R276a). The petitioner received these forms when it was the most recent employer. It had no knowledge of disqualifying causes and did not respond to the Commission. After the new form was adopted, the petitioner was never notified that a decision had been made upon any benefit claim for which it was charged. This was conceded by the court below.

During the hearings before the referee in 1943 upon the petition to redetermine the contribution rate, the Commission did not produce any form of decision on the benefit claim (R251a). The deputy testified that the decision was the Commission's benefit check which was given to the claimant (R48a). Since the petitioner received no notice of a decision, the check was delivered and payments were made to the claimant without affording to the petitioner the right to appeal and to receive an opportunity to be heard.

In November 1943, at the last hearing before the referee, the Commission offered into evidence a series of statements containing information with respect to each benefit claim for which the petitioner was charged (R249a). These statements were compiled by the Commission from various sources of information within the agency for use as an exhibit in the cause (R3a).

It was established at the hearings that the deputy of the Commission never conducted a hearing at which the petitioner was afforded an opportunity to be heard, that if

there was any examination of the claims, finding of facts or making of decisions, it was done not by the deputy but by subordinates in the department (R42a to R43a; R59a; R263a).

Argument.

1. The payment of unemployment benefits and the charge against the employer involved were concurrent events under the statute. This charge was the taking of property and the petitioner was entitled to be heard before it was made. *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126 (1941); *Morgan* v. *United States,* 304 U. S. 1 (1938).

The only opportunity to be heard which the statute afforded was by an appeal from the decision of the deputy. Upon this appeal the claimant would be required to establish his right to benefits in a hearing in which the employer could participate. Unless the claimant established the validity of his claim in the appeal tribunal, no payments of benefits could be made to him. The failure of the Commission to promptly notify the petitioner of any decision, as required by the statute, destroyed this right of appeal and destroyed the opportunity of the petitioner to be heard upon the validity of the claim.

The destruction of the hearing afforded on the appeal was of vital importance in this case because the statute made no provision for a hearing prior to the deputy's decision, and none was ever held. The function of the deputy in finding facts and making the decision thereon was quasi-judicial under decisions of this court, *Morgan* v. *United States,* 298 U. S. 468 (1936) and under New Jersey law, *Penna. Railroad Co.* v. *New Jersey State Aviation Com.,* 2 N. J. 64 (1949). Both the majority and minority

opinions in the court below recognized that the deputy in this case exercised quasi-judicial powers. The majority held, however, that when the petitioner was before the agency in 1943 upon its petition for a redetermination of the rate, it was afforded an adequate hearing under due process, as to which there was full appellate review. To support this view, however, the court cites rules of the Supreme Court of New Jersey which were not adopted until September 15, 1948 after the new Constitution of New Jersey became effective. Prior to that time review by writ of certiorari, the writ which was used here to take the case from the Commission, was purely discretionary with the court. *Gallena* v. *Scott,* 1 N. J. 430 (1949).

But the hearing which the petitioner secured in 1943 was not concerned with the validity of each claim for benefits. The issue there presented is the same now before this court: whether the rate charged against the petitioner was fixed without compliance with the statute and without affording due process. In that proceeding not one claimant was produced to substantiate his right to benefits which had been paid to him months and even years previously. For each such claimant the decision under the statute had long become final when no appeal was taken after 7 days from the decision and the benefits were paid. Nor is there involved in this case any question of the recovery from the employees of benefits paid. This is barred by statute. N. J. R. S. 43:21-6(d) and 43:21-6(b)(1).

The purpose of the statutory requirement that the employer charged with the benefit payments receive notice of the decision was to insure the opportunity to be heard on an appeal and thus to guarantee due process under the United States Constitution. The failure of the Commission to send this notice was a deprivation of petitioner's

property without due process of law in violation of the United States Constitution. Other states which have passed on similar questions have held contrary to the decision below. *Juster Bros. Inc.* v. *Christgau,* 214 Minn. 108, 7 N. W. 2d 500 (1943). In *Bell-Brook Dairies, Inc.* v. *Bryant,* 35 Cal. 2d 404, 218 P. 2d 1 (1950), the statutory requirement was notice of the filing of the claim, instead of notice of the decision as provided in the New Jersey statute. The court eliminated benefits charged where there was no compliance with the statute.

2. The court also held that the Commission was justified in substituting for the statutory notice of decision a notice that a claim for benefits had been filed. But this substituted notice was not authorized by any statute and the decision below sustaining the substituted notice as appropriate for due process is contrary to decisions of this court. *Wuchter* v. *Pizzutti,* 276 U. S. 13 (1927).

The substituted notice did not provide for any hearing nor was the petitioner notified that the Commission would no longer send a notice of the decision, as directed by statute. The petitioner was entitled to wait for the notice of the decision before it elected whether to appeal and thus obtain a hearing, or to default. *Mullane* v. *Central Hanover B. & T. Co.,* 339 U. S. 306 (1950).

The substituted notice requested the petitioner to respond only if it had any information which might disqualify the claimant (R. 276a). The petitioner had no such information and, therefore, did not respond to the notice as it was not required to do under the very notice itself. This failure to respond is said by the court below to be the basis of estoppel and laches. But the petitioner had no duty to respond and its failure to supply information as to disqualify causes did not *ipso facto* qualify the claimant

for benefits. The duty of finding facts and making the decision imposed by statute on the deputy was not to be eliminated merely because one of the former employers of the claimant knew of no reason to disqualify him from benefits. As the minority opinion below points out, there were many statutory reasons for disqualification which the employer could not be expected to know. Many arose after the separation from employment.

The petitioner never conceded that the benefit payments were valid and the statement to that effect in the majority opinion is not supported by the record. The petitioner conceded only that its own records disclosed no disqualifying causes. This is pointed out in the dissenting opinion. Petitioner never had an opportunity to attack the validity of the benefit claims because it never received a decision thereon from the Commission in the manner which the statute provided. The use of estoppel and laches to support the denial of due process is unsubstantial and inadequate as an independent ground for the decision below. The shift by the Commission in the forms which were used and the elimination of the notice of decision is of itself sufficient to prevent the application of estoppel against the petitioner. *Moser* v. *United States,* 341 U. S. 41 (1951). There was no warning of this change of course and this court will not under such circumstances presume acquiescence in the loss of a fundamental right. *Ohio Bell Teleph. Co.* v. *Public Utilities Com.,* 301 U. S. 292 (1937).

Where petitioner was the employer in the base year of the claimant, charges were made against its account by the Commission without even a notice to the petitioner that a claim for benefits had been filed. The majority opinion in the court below refused to pass upon this obviously invalid procedure because it claimed that the

amount of base year charges involved was not sufficient to change the rate for 1942. The court did not consider the cumulative use of the base year charges and their effect on future years. Nor did it consider the fact that all charges for 1943, 1944 and 1945 were involved in the litigation by stipulation of the parties (R20a). Petitioner is thus required to bear the charges for benefit payments where it did not even have notice of the filing of the claim for benefits.

3. The statutory requirement that there be a decision by the deputy upon the claim for benefits was not followed. The record discloses that benefit payments were made without any such decision being rendered. Efforts of the petitioner to obtain copies of a decision were unsuccessful. The Commission constantly shifted its position with respect to the decision.

The first response of the deputy was that the check given to the claimant was the decision (R48a). Since the employer was never notified of the delivery of benefit checks this argument was dropped. In its brief in the Appellate Division of the Superior Court of New Jersey the Commission contended that the Form B-11, the notice of the filing of the claim, was the decision. This position was abandoned at the oral argument because the B-11 did not contain the elements of the decision which the statute provided. In the Supreme Court of New Jersey the Commission argued that the decision was embraced in an exhibit which was offered into evidence in November, 1943 at the close of the hearings before the Commission's referee. This is the Exhibit P-19 (R289a), which was prepared for the purposes of the hearing (R248a) and contained information compiled from various sources within the Commission (R3a). At the hearing

the deputy testified that this exhibit was not the decision (R253a). The deputy admitted during the hearings that he was unable to produce any decision (R251a).

The failure of the deputy to comply with the statute and render a decision upon the benefit claims charged against the petitioner constituted a denial of due process under the Fourteenth Amendment to the Constitution of the United States. *Morgan* v. *U. S.*, 298 U. S. 468 (1936).

4. The decision below sustains the action of the Commission despite the fact that the deputy delegated to subordinates the duty of investigating the claim, finding the facts and making the decision. This delegation was unconstitutional and deprived petitioner of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. *Morgan* v. *United States*, 298 U. S. 468 (1936).

Conclusion.

For these reasons it is respectfully submitted that the writ of certiorari should be granted.

Dated October 9, 1951.

Samuel Kaufman

SAMUEL KAUFMAN,
Counsel for Petitioner.

Appendix.

New Jersey Revised Statutes Title 43:21-6(b)*

"(b) Initial determination. A representative designated by the executive director, and hereinafter referred to as a 'deputy', shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof or shall refer such claim or any question involved therein to an appeal tribunal or to the board of review, which shall make its determinations with respect thereto in accordance with the procedure described in subsection (c) of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of subsection (d) of section 43:21-5 of this title, the deputy shall promptly transmit his full findings of fact with respect to that subsection to the board of review, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. Unless the claimant or any such interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last-known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the board of review, shall be paid only after such determination; provided, that if an appeal tribunal affirms a decision of a deputy, or the board of review affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid."

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*This statute has been amended since the beginning of the

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR RESPONDENT IN OPPOSITION.

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